

April 29, 2008

Honorable Chester J. Straub
Honorable Rosemary S. Pooler
Honorable Sonia Sotomayor
United States Court of Appeals
for the Second Circuit
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street
New York, NY 10007

Re: New York State Restaurant Ass'n v. New York City Board of Health et al.
No. 2008-1892-cv

Your Honors:

I write in response to the Appellees' letter of earlier today. While extending a "no fine" period through July is an important further concession that there is no harm to the Appellees by extending the stay of enforcement, the Department of Health has made it clear that it intends to use its *other* coercive powers to issue notices of violation and otherwise bring to bear the power of the state to force restaurants to comply with the regulation. By issuing notices of violation with "points," and by publicizing the accumulation of such "points," the Department of Health would accomplish what it suggests it would not to do by issuing fines. A stay of fines is no stay at all in these circumstances.

When the parties were before the District Court, the Department of Health repeatedly consented to *complete* stays of *all* enforcement to permit the adjudicative process to be completed. Those stays provided that:

defendants shall take no steps to enforce section 81.50 ... including but not limited to issuing warning letters, notices of violation or violation, making statements on the New York City Department of Health's website or elsewhere indicating that restaurants or other entities are not in compliance with section 81.50, or assessing fines or penalties.

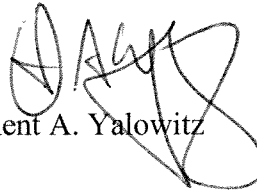
Milburn Declaration in Support of Motion for Stay, Ex. A; *see id.* Exs. B and C.

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The Department of Health does not explain why it should now be excused from a similar stay, given the serious (and unanswered) questions about the regulation's lawfulness and effectiveness, and it does not explain why its partial concession furthers the public interest. Having agreed—for whatever their reasons—to suspend enforcement, and having agreed to incorporate that suspension in series of court orders, Appellees cannot now credibly argue that they will be harmed by the stay requested in the current motion.

It is unclear why Appellees chose July 18 as their deadline for a ruling on the merits. Until a Merits Panel rules on the appeal, a continuance of the *complete* stay now in effect is necessary to protect the constitutional rights at stake here. Without such an extension pending appeal, the Association's members will be irreparably injured.

Respectfully yours,



Kent A. Yalowitz

cc: Fay Ng